

2021 APAAC Annual Prosecutor Conference

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Between Charging & Charged: The Humble Power of the Prosecutor

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It is impossible to understand the importance of this change without being aware of the enormous power wielded by prosecutors in this country. Most people who end up in jail or prison arrive courtesy of the twenty-seven thousand prosecutors in county and city district attorney offices across the country. (Prisoners in federal lockups account for only 12 percent of the national prison population.) Some offices are enormous, such as that of the

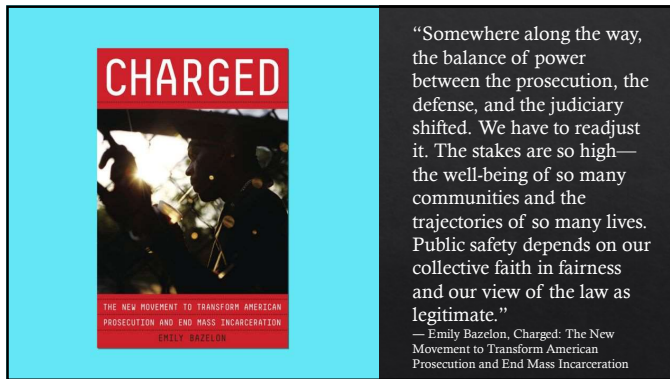


A portrait of Lacey, a Black woman with short dark hair, wearing a dark suit jacket over a white shirt and a pearl necklace. She is standing with her arms crossed in front of a red and white striped background and a circular emblem featuring a star and a gear.

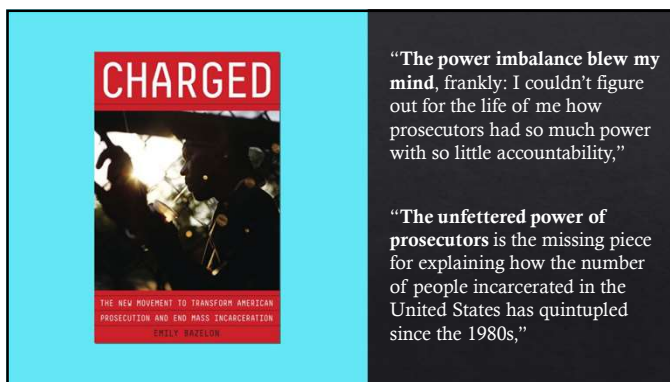
"Think of it this way," he told me. "The most powerful single individual who can personally and directly affect the largest number of individual lives in this country is not Donald Trump. It's Jackie Lacey, district attorney for Los Angeles County. There are fully ten million people in the area covered by her office that she can potentially choose to indict, or not indict, on major or lesser charges, send to jail or not, and all without having to refer to the city council or anyone else." Smith singled out Lacey because her office covers a larger population than anywhere else, but D.A.s across the country exercise similarly untrammelled power. For this reason, in his 2017 book *Locked In*, Fordham law



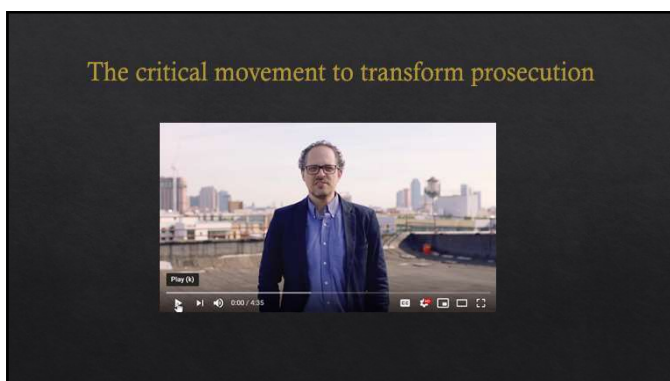
A portrait of Donald Trump, wearing a dark suit, white shirt, and red tie. He is pointing his right index finger directly at the camera.



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The critical movement to transform prosecution



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The critical movement to transform prosecution



First Opened November 13, 1989. People who were born that year, on that date, are 31 years old today.

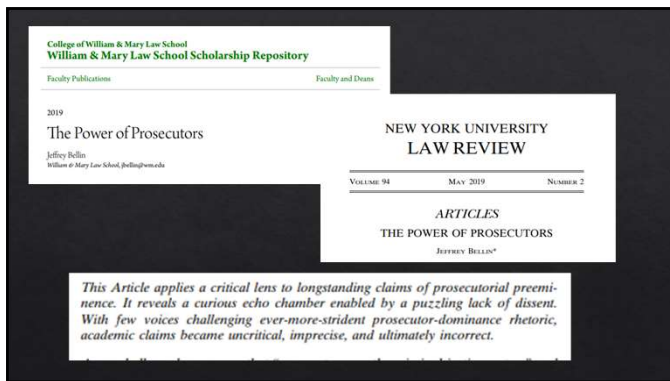
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The critical movement to transform prosecution



Reference to the amount of gross revenues Marvel made by demonstrating that Justice is coercive.

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Incoherence and Marginalization

- Power is fully criticized but never fully explained. It is just made out to be incoherent. And the Prosecutor is made out to be the anti-hero.
- Prosecutors begin to question their own legitimacy.
- Prosecutor silence does not help.

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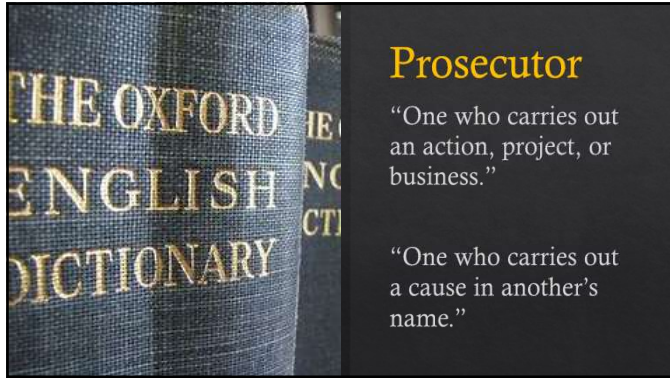
Incoherence and Marginalization

The decision to disparage the Prosecutor hinges less upon definitive matters of law than on a set of highly malleable political, moral, and visceral considerations.

Goal:

1. To neutralize the Prosecutor in the debate about law, rule and policy.
2. Proceed with "Smart Justice" on legislative and rule-making fronts.

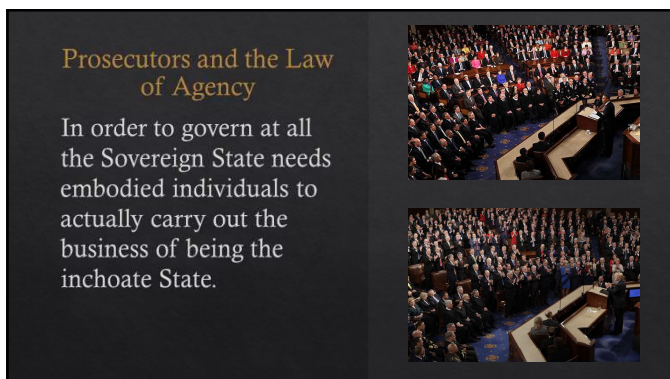
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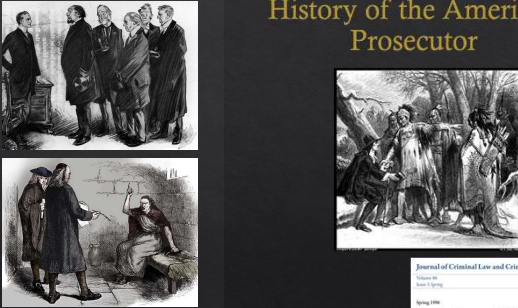


Prosecutors and the Law of Agency

Through law the State defines the roles and methods of the Prosecutor; the qualifications and authority of the Prosecutor; how the position is carried out; or more simply:

Where the position's assignments begin and end.

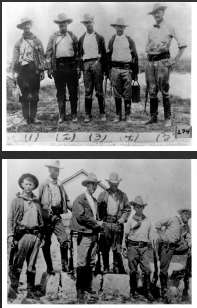
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History of the American Prosecutor

Journal of Criminal Law and Criminology
Volume 98
Issue 1 Spring
Spring 1998
Recasting Prosecutorial Discretion
Robert L. Mott

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History of the American Prosecutor



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History of the American Prosecutor

Common Criticism stated concisely:

Appointed prosecutors are beholden to the top down "at will" politics of the appointment and removal process.

Popularly-elected prosecutors, being relieved of patronage in a bottom-up Election, are executive officials exercising *individual discretion* to enforce laws locally.

In this way the local prosecutor expands "Power".

Recasting Prosecutorial Discretion, Robert Misner, *Journal of Criminal Law and Criminology*, 86 J.Crim.L. &Criminology 717, 729-730 Spring 1996.

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What you focus on grows, what you think about expands, and what you dwell upon determines your destiny.

Robin S. Sharma

audible

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Power	“ENORMOUS Power”
	UNFETTERED Power”
	“A TON of Power”
	“ALL The Power”
	<small>·The popular mythology of prosecutorial power.</small>

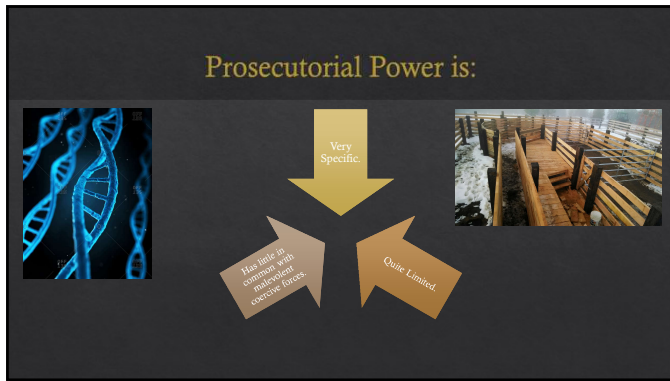
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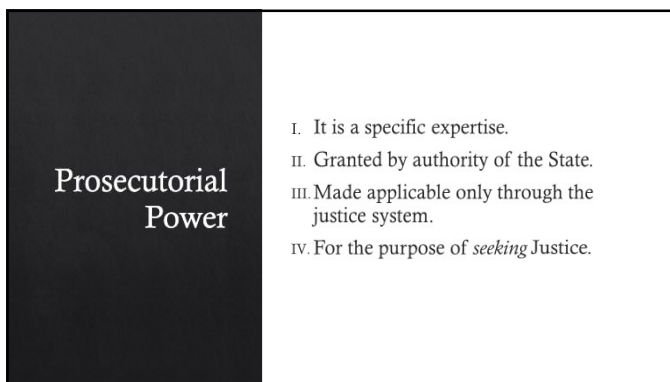
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Power	The Power of the Prosecutor is the <i>authority to decide</i> , and having decided:
	· To make that decision <i>effective</i> upon <i>others</i> .
	· To <i>influence</i> the outcome of the <i>next decision</i> to be made by <i>others</i> .

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**II.
LIMITED
AUTHORITY OF
THE STATE**

Arizona abolished the
notion of common law
criminal offenses.

State law now describes
what constitutes a
public offense.

Ariz.Rev.Stat. §1-211(C). Ariz.Rev.Stat. §13-101
Only the conduct or omissions proscribed by the Legislature constitute public offenses a prosecutor may pursue.

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Public Policy of the Arizona Criminal Code

- Prescribe conduct that unjustifiably and inexcusably
Causes or threatens substantial harm
To individuals or public interests.
- Give fair warning of proscribed conduct and
sentences authorized upon conviction.
- Differentiate between serious and minor offenses.

Ariz.Rev.Stat. §13-101

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**Public Policy
of the Arizona
Criminal Code**

Insure	Insure public safety.
Impose	Impose Just punishment on those whose conduct threatens the public peace.
Promote	Promote truth and accountability in sentencing.

Ariz.Rev.Stat. §13-101 (cont.).

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III. THROUGH THE JUSTICE SYSTEM

ARIZ. CONST. Art. 2, §11; Ariz. R. Crim. P., 1.1. Speedy trial requirements are primarily the responsibility of the prosecutor. See: *State v. Brannin*, 109 Ariz. 525 (1973).

Just how a prosecution is undertaken is primarily a matter of Rule.

The driving purpose of the criminal rules are to provide for the just and speedy determination of every criminal proceeding.

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Rules of Evidence

The Arizona Rules of Evidence set guardrails upon what information the State may use to seek a prosecution or conviction.

It is only the *admissible* evidence that can constitute a fair prosecution.

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“These Rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, *to the end of ascertaining the truth, and securing a just determination.*”

Rule 102,
Ariz.R.Evid.

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National Prosecution Standards

A prosecutor is the only one in a criminal action who is responsible for the presentation of the truth.

Justice is not complete without the truth always being the primary goal in all criminal proceedings.

National District Attorneys Association, National Prosecution Standards, Part I, Commentary.

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Rules of Procedure

The Arizona Rules of Criminal Procedure are construed by the Courts, parties and crime victims to:

- secure simplicity in procedure;
- fairness in administration;
- the elimination of unnecessary delay and expense; and
- to protect the fundamental rights of the individual while preserving the public welfare.

Ariz.R.Crim.P., Rule 1.2 (Jan. 1, 2018).

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IV. TO SEEK JUSTICE

- The First Virtue of Social Institutions.

John Rawls, *A Theory of Justice* (1971).
For further reference: <https://youtu.be/5JQ17X6VNg>

- Justice Centers Upon The Notion of Basic Fairness.
- Justice Appeals To Our Inherent Bias For Safety, Security, Trust and Cooperation.

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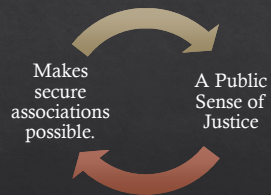
Society is well ordered when it is:

- Designed to advance the common good; and
- Effective at regulating a public sense of justice.

**A Public Sense
of Justice**

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TO SEEK JUSTICE



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Justice and Law

We use law to declare our rational expectations for a Just future:

(a) Before the undesirable circumstances happen. And:

(b) Because the undesirable circumstances will happen.

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The Role of the Prosecutor

The Law assigns persons whose duties are to assure that

When the undesirable circumstances do occur,

Still our outcomes line up with our expectations.

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That a jury
of

There is a *sufficient* amount

By *proof beyond a reasonable doubt*

Admissible evidence

Will convict the defendant of the alleged offense

For the prosecutor to form a *reasonable belief*

Example:
Charging Review

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A prosecutor should seek or file criminal charges *only if* the prosecutor *reasonably believes* that the charges are supported by probable cause, that *admissible* evidence will be *sufficient* to support conviction *beyond a reasonable doubt*, and that the decision to charge is *in the interests of justice*.

ABA Standard
3-4.3(a)

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Preliminary Hearings

State has the burden of establishing probable cause before an impartial magistrate; and

The accused can cross-examine the State's witnesses; and

Argue against the State's conclusions.

Magistrate must dismiss without showing of substantial evidence that an offense was committed and the accused committed it.

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Indictment

Grand Jury proceeding of *sworn citizens*

Who can only indict if they are *convinced*

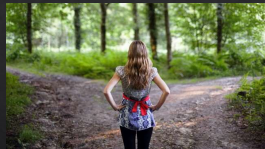
That it is *more probable than not* that

an offense was committed

And *the accused* committed it.

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The Mediating Role of Discretion



The interests of Justice support a decision to charge.

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Justice Wisdom Courage Temperance

Temperance - Purposeful Restraint.

Although the State could exercise the full extent of its authority the prosecutor settles for less because it serves a greater good.

The Mediating Role of Discretion

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The Mediating Role of Discretion

Not to seek charges at all

Adjust felony charges to misdemeanor status

Defer prosecution and divert prosecution

Adjust charges to make probation available

Run probation in conjunction with in-patient and outpatient services.

Provide for probation with restitution for financial offenses.

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ABA Standard 3-4.4

the strength of the case;	the prosecutor's doubt that the accused is in fact guilty;	the extent or absence of harm caused by the offense;	the impact of prosecution or non-prosecution on the public welfare;	the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;	whether the authorized or likely punishment or collateral consequences are disproportionate in relation
to the particular offense or the offender;	the views and motives of the victim or complainant;	any improper conduct by law enforcement;	unwarranted disparate treatment of similarly situated persons;	potential collateral impact on third parties, including witnesses or victims;	cooperation of the offender in the apprehension or conviction of others;
the possible influence of any cultural, ethnic, socioeconomic or other improper biases;	changes in law or policy;	the fair and efficient distribution of limited prosecutorial resources;	the likelihood of prosecution by another jurisdiction; and	whether the public's interest in the matter might be appropriately vindicated by available civil regulatory;	administrative or private remedies

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National Prosecution Standards 4-2.4 Charging Factors to Consider

- The nature of the offense, including whether the crime involves **violence** or **bodily injury**.
- The **probability of conviction**.
- The characteristics of the accused that are relevant to his or her blameworthiness or responsibility, including the accused **criminal history**.
- The value to society of incapacitating the accused in the event of conviction.
- The potential deterrent value of prosecution to an offender and to society at large.

National District Attorneys Association, National Prosecution Standards, Third Edition.

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National Charging Standard 4-2.4 (cont.)

The willingness of an offender to cooperate with law enforcement.

The defendant's relative level of culpability in a criminal activity.

The status of the victim, including the victim's age or special vulnerability.

Whether the accused held a position of trust at the time of the offense.

Excessive costs of prosecution vs. the seriousness of the offense.

Recommendation of law enforcement personnel.

The impact of the crime on the community.

Any other aggravating or mitigating circumstances.

National District Attorneys Association, National Prosecution Standards, Third Edition.

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(Summary)

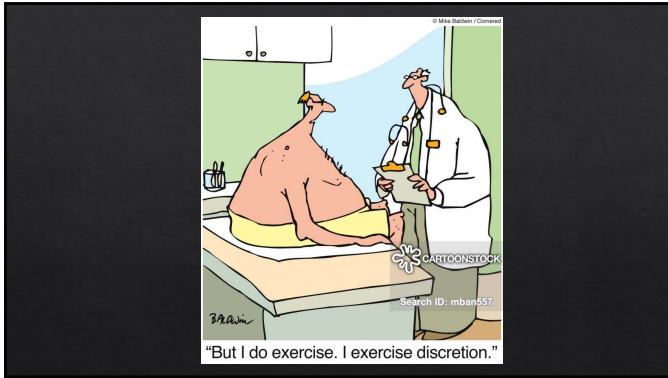
E.R. 3.8 **Special Responsibilities of the Prosecutor;**

E.R. 3.10 **Credible and Material Exculpatory Information about a Convicted Person.**

- Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.
- Assure that the accused of the right and procedure for obtaining counsel.
- Not seek waivers from an unrepresented accused.
- Make timely disclosure of all evidence and information, including mitigation.
- Refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.
- Continuing duty of prompt disclosure of new, credible and material, exculpatory evidence.

Rule 42, Arizona Rules of Professional Conduct

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<h2 style="margin: 0;">The Argument</h2>	<p>Critics promote the notion that Prosecutors have a Power that is enormous and total and unfettered and coercive. But this is <u>not</u> an argument based upon law.</p> <p>It is an argument grounded in highly malleable political, moral and visceral concerns. It embodies strong, emotive language to elicit <i>feelings</i> over rationality.</p>
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<h2 style="margin: 0;">The Refutation</h2>	<p>Amassing coercive power is what malevolent super-villains do.</p> <p>But it is not what prosecutors do, or even <i>can</i> do.</p>
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The Quantum of Prosecutorial Power

Strictly limited to statutory offenses set forth by a Legislature.	Restrained by the public policy for which a Criminal Code exists at all.	Dependent upon the weight, credibility, and sufficiency of the <i>admissible</i> evidence.	Instituted by experts in criminal law, who are licensed and regulated by the Arizona Supreme Court via the State Bar Association.
Metered by the necessity for probable cause. And then,	Ethically filtered through the additional need for a reasonable belief that there is a <i>sufficient</i> amount of <i>admissible</i> evidence to support a conviction at jury trial by <i>proof beyond a reasonable doubt</i> .	A duty to affirmatively seek the reversal of unjust convictions.	The weight of our accumulated experience.

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The Counterweights to Prosecutorial Power

The burden of proof.	The burden of proceeding.	The presumption of innocence.	The right to silence.
The right to assistance of counsel.	The right to due process, including speedy prosecution.	The right to application of equal protection.	The right to trial by jury, and conviction by a jury of peers.
The right to appeal from unjust convictions.	The right to plead ineffective assistance of counsel.	The presumptive right to bond in most circumstances.	

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The Counterweights to Prosecutorial Power

A Criminal Justice System designed to produce acquittals.

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Talking Prosecution without Talking Power



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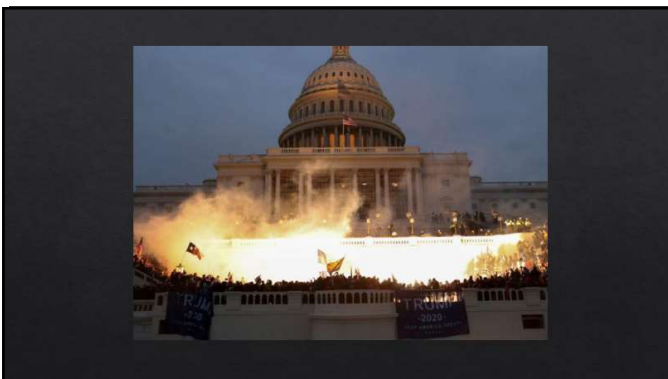
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